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THE LAW OF PONDS.

AN article in the February number of the HARVARD LAW REVIEW, entitled "Great Ponds,"[1] deserves attention, because it is the most studied attempt hitherto made to defend the conclusion, though not the reasoning, of the majority of the court in the Watuppa Pond cases. We say the conclusion and not the reasoning, because the author of the LAW REVIEW article, while not contesting the reasoning of the majority of the court, tacitly discards it, and rests his own argument upon grounds not referred to in the opinion.

As stated in the December number of the LAW REVIEW,[2] "all the judges apparently admitted that, according to the common law, the Legislature could not authorize the taking of the water of a pond without providing for compensation for damages done the riparian owners on the outlet stream by a diminution of its flow. But the majority[3] of the court were of the opinion that these cases were taken out of the general rule, because the North Watuppa is a 'great pond,'[4] governed by the provisions of the Massachusetts Colony Ordinance and Ancient Charter of 1641–

[1] 2 HARVARD LAW REVIEW, 316.

[2] 2 HARVARD LAW REVIEW, 196.

[3] Watuppa Reservoir Co. *v.* City of Fall River, 147 Mass. 548.

[4] It has recently been said inadvertently, referring to Mass. St. 1869, c. 384, that "by the present laws great ponds are defined to be ponds the area of which is more than twenty acres," and a similar statement was made by us in 2 HARVARD LAW REVIEW, 197, 198. Our attention has been called by one of the editors of this REVIEW to the fact that Mass. St. 1869, c. 384, did not change the limit of what should be deemed great ponds, but merely granted to the littoral owners on ponds between ten and twenty acres in extent certain rights as to fisheries. See also St. 1888, c. 318.

47,"[1] and that the effect of the ordinance was to give the Legislature absolute power over the waters of the pond. The author of the article on "Great Ponds," on the other hand, does not rest his support of the Watuppa Pond decision upon any rule peculiar to Massachusetts great ponds, but asserts that the right of riparian proprietors to the undiminished flow of a stream of water depends upon the law of watercourses, or of running water; that a watercourse must have a perceptible current; that when the water is still, or has no perceptible current, we have to deal with a different body of law, — the law of lakes and not the law of watercourses, — and he argues that there is no legal rule prohibiting the diversion of still water, *i. e.* water without perceptible current, even though it forms an integral part of a waterway. While, therefore, the whole court in the Watuppa cases admitted that there would be a right of action for diversion from a pond not affected by the Colony Ordinance, the author of the article on "Great Ponds" insists that any right on the part of a riparian proprietor on the outlet stream of a pond, either great or small, to object to the diversion of water from the pond is yet to be established. He does not seriously controvert the position taken by us in the December number concerning the effect of the ordinance, but asserts a new doctrine which is opposed to the rule of law assumed to be correct by all of the judges. We have, therefore, no occasion to reconsider the conclusions previously reached by us, but merely to examine what may fairly be considered the novel point now presented.

The point is thus expressed by him *passim*: —

"The agreed facts find that there was 'no perceptible current whatever' [in the North Watuppa Pond]. Did, therefore, any watercourse, in point of law, continue clear through the lake, several miles long, or did the watercourse in which the plaintiff had a right commence at the point where the water started into motion at the outlet? . . . The water lawyers hoped for a full discussion here upon the topic whether and when a lake is a watercourse. They have seen many books entitled Law of Watercourses, Law of Running Waters; less about the law of still waters or the law of lakes, and almost nothing about the intermediate case, where there is a lake with one brook running out of it and another running into it. . . . The law of running water originated

[1] Recent investigations point to the conclusion that the extension of the provisions in the Body of Liberties relating to Great Ponds was made in 1660, and not in 1647. See "Introduction to the Reprint of the Colonial Laws containing the Body of Liberties" (Boston, 1888), by William H. Whitmore.

in natural right. . . . Such duty and right grow out of motion, continued, definite, perceptible movement of that part of the realty we call water. . . . No such course of thought, no such desired legal adjustment of correlating rights, call for such law in respect of waters that do not move."

If, in reality, the point made relates only to waters which do not move, we are not concerned with it in connection with the Watuppa Pond cases; for the water in the two Watuppa Ponds did move, and supplied the Quequechan with all its water, the average flow being about twenty-six million gallons daily. The North Watuppa Pond alone, from which the diversion took place, was stated in the agreed facts to be capable of yielding fifteen million gallons of water daily. The main source of supply of this pond was from "springs beneath its surface." We must, therefore, suppose that the author intends to distinguish between waters which move with perceptible current and those which move without perceptible current, and not between waters which move and those which do not move. But does he intend to say that the test of perceptible current is to determine always and absolutely the question of what is a watercourse, so that that part of a river in which there is no perceptible current is not a watercourse of which the law of running waters can be predicated, and that that part of a lake in which there is perceptible current is a watercourse of which the law of still waters cannot be predicated? It would appear that this new cross-division of the law must be maintained by the writer, cost what it may; for current that can be perceived is the only possible difference between waters which ordinarily move slowly within the broad bed of a lake or pond, and waters which ordinarily move rapidly within the narrower confines of a river. But even this distinction might be an unfortunate one to draw when attempting to support the Watuppa Pond cases, for it appeared by the agreed facts that "at or near the passage into the South Watuppa Pond there is generally a slight current towards the latter," and that the taking was from the North Pond within a short distance of the passage. It was only in the "body of the pond" that there was no perceptible current.

The right of riparian owners is to the flow of the stream on their land, as it has been accustomed to flow. They have no title to the water above them, nor any right as riparian owners to the watercourse above their own land. The water may be diverted with impunity above, provided it is returned to the old channel

before or when it reaches their land. It is the watercourse present with them, on which their lands abut, from which spring their legal rights. It does not follow that to enable them to complain, the interruptions of such flow must be interruptions of a watercourse at the point where the interruption takes place, though of course ordinarily the diversions which arise are of water already forming part of a watercourse. In order to sustain our author's position, it would be necessary for him to establish not only that a lake with no perceptible current is not a watercourse, but also that diversions from a lake with no perceptible current are not actionable. A careful examination of the article on "Great Ponds" will, we think, show that its author not merely fails in this task, but that in essaying it he begins by misstating the position of the minority of the court in the Watuppa Pond cases, proceeds by misinterpreting authorities, and ends by drawing illogical conclusions.

An investigation of the cases will lead the reader to a choice between the two horns of this dilemma, either: First, *A pond with an outlet stream is part of a watercourse for all purposes within the meaning of the law of watercourses, without reference to the test of perceptible current*, or, second, *So far as concerns the right of riparian owners on the outlet stream of a pond to a flow undiminished by subtraction from the pond itself, it is immaterial whether the pond itself is for all purposes to be treated as a watercourse*; for the inquiry whether or not a lake or pond should be deemed a watercourse is irrelevant, unless it be shown that the diversion from a watercourse only gives rise to an action.

The minority opinion in the Watuppa Pond cases had stated that "The *river* and *ponds* are parts of a natural waterway, through which the water passes directly from its sources to the sea. Together they constitute a single system and natural feature of the country, the preservation of *whose* form and identity is essential to the enjoyment of all the property bordering upon *their* waters."[1] This statement the Law Reviewer misquotes so as to read, "*the form and identity of the natural features of the country*," thus foisting upon the minority the position that a riparian owner's

[1] 147 Mass. 548, 562. The italics here and elsewhere are ours.

rights are, to "configuration of the soil from mountain-top to the sea." The "form and identity" the court referred to was obviously and grammatically that of the waterway composed of river and ponds. The substituted statement of the reviewer would apply to the whole drainage basin of the water system, and prohibit any change in its natural features. On this misstatement of fact hangs the whole argument from analogy, the analogies cited being taken wholly from the law of land, and having no application to waterways composed of rivers and ponds. That upland forests may be felled without regard to the incidental damage done on a stream through consequent floods or freshets; that marshes and swamps may be drained with similar disregard; that surface-water may be diverted without giving rise to a liability; that no prescriptive right can be obtained to the passage of rains and melting snows over the surface of the land; that subterranean percolations are subject to the right of the owner of the soil to use his soil for proper purposes, though they are thus cut off from a watercourse,— are all cases in which the right of the owner to a reasonable use of his land has been sustained, notwithstanding the casual damage to water privileges.[1] If the minority opinion had maintained (as the author says it did) that the maintenance of "the form and identity of the natural features of the country" is the riparian owner's right, then these cases would have a bearing to show in contradiction that land may be dealt with by its owners as they please, so long as water which has reached a defined bed and limits is not interfered with. But as, in fact, the court referred solely to the "form and identity" of the watercourse of ponds and rivers, these cases have no application. They mark the line where the law of waters meets the law of land and is limited by it, and not, as is contended, the division between the law of running and the law of still waters.[2]

The following are the cases relied upon in the article on "Great Ponds."

[1] It is by no means clear that a marsh owner can always drain his swamp so as to dry up or diminish a watercourse which it directly feeds. The only authority cited is the dictum in Broadbent *v.* Ramsbotham, 11 Exch. 602, where the connection between swamp and watercourse was neither direct, certain, nor constant. See Williamson *v.* Canal Co., 78 N. C. 156; Bennett *v.* Murtaugh, 20 Minn. 151.

[2] In fact, perceptible current can often be predicated of swamp and surface waters and subterranean percolations which are not watercourses.

(1.) Of Macomber *v.* Godfrey, 108 Mass. 219, the author says: —

"They [the water lawyers] were told by the court that even being a 'natural waterway' is not enough to make it a watercourse, unless there is a current."

Turning to that case, we do not find the words "natural waterway" used at all; nor do we find the proposition laid down that a natural waterway is not a watercourse unless there is a current. Indeed, there was a current at all points in the body of water in question, and the sole issue was whether the fact that on the land of the plaintiff it broadened out, though maintaining its current, and spread itself across without definite channel, prevented its being a watercourse on his land. The point decided was that the absence of defined banks did not upon all the facts of the case, including the fact of current, prevent the application of the law of watercourses. It should be noticed that the question was not whether it was a watercourse at the point where the diversion took place, but whether it was such on the land of the plaintiff. The court contrasted the case with that of surface-water and water flowing in temporary outbursts caused by melting snow and rain.

(2.) The author next asserts that: —

"To entitle it to the consideration of the law, it is certainly necessary that it should be a watercourse in the proper sense of the term;"

purporting to quote Lewis, C. J., in Wheatley *v.* Baugh, 25 Pa. St. 528, and also cites to the same effect Bigelow, C. J., in 2 Allen, 589. The language quoted cannot be found in either case. Wheatley *v.* Baugh was a case of underground percolations, in no definite channel, supplying a spring, and cut off by the use of superjacent land for mining and other lawful purposes, and in it the court said: —

"Percolations spread in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land. Accordingly the law has never gone so far as to recognize in one man a right to convert another's farm to his own use, for the purposes of a filter.

"Such a claim, if sustained, would amount to a total abrogation of the right of property."

In Griffith *v.* Jenkins, 2 Allen, 589, the plaintiff's declaration was tort for diverting the water of a brook or ancient watercourse

running through his land. His proof was of the diversion of a brook above his land which did not come to his land, but emptied into a swamp thereon. The court declared that a swamp is not a brook. Bigelow, C. J., says: —

"The gist of the cause of action is for a diversion of the water of a stream or watercourse. This was an essential and material averment, which the plaintiffs were bound to prove in order to maintain their action, and it was a variance to show that the acts of the defendants had drained water from the swamp without any proof to sustain the allegation of a diversion of water from a brook."

(3.) State *v.* Gilmanton, 9 N. H. 461, 14 N. H. 467, was an indictment for not keeping a highway in repair. The issue depended upon whether a certain bridge was within the limits of a town, and that again on the title to certain land under a body of water which formed one boundary of the town. If this was a river, the law of New Hampshire held the title of the town to extend to the centre thereof; if any large body of water not a river, by whatever name called, the town boundary was at the water's edge. It was held that, on the other special facts of the case, the existence of a perceptible current became controlling evidence in determining whether the body of water in question was a river or not a river. The question of watercourse was not raised, nor were any riparian rights involved. It was expressly affirmed that a lake would not lose the character of a lake, simply because it had a current, and that "a sheet of water in which there is a current from its head towards its outlet is not, therefore, a river." In other words, it declares that the test of perceptible current is not generally applicable even to distinguish lakes from rivers.

(4.) Broadbent *v.* Ramsbotham, 11 Exch. 602, is next cited to the effect that

"defendant owned a pond of six acres, the overflow of which went into the plaintiff's brook. The court held, plaintiff's right cannot extend further than the flow into the brook itself and to the water flowing in some defined natural channel. Before it reaches such defined channel the land-owner had the right to appropriate it."[1]

[1] It would hardly be believed from this reference that the Massachusetts court in the case of Macomber *v.* Godfrey, *supra*, had cited this same English case as authority for the proposition that

"If the whole of the stream had sunk into the defendant's soil, and no water remained to pass to the plaintiff's land except under the surface, it would have ceased to be a watercourse, and the plaintiffs would have had no right to it."

This so-called pond is thus described by Alderson, B. (p. 614) : —

"Above Pighill Wood a shallow basin is formed by the landslips, which have from time to time occurred, and the water collected in it, if it exceeds the depth of about three feet above the lowest point of the basin, escapes northward and runs down over the surface of the hill towards Longwood Brook. The rest sinks into the ground or remains as a pond in the hollow thus naturally created by the form of the land. Now, we think that this water, both that which overflows and that which sinks in, belongs absolutely to the defendant on whose land it arises, and is not affected by any right of the plaintiff. The right to the natural flow of the water in Longwood Brook undoubtedly belongs to the plaintiff; but we think that this right cannot extend further than a right to the flow of the brook itself, and to the water flowing in some defined natural channel, either subterranean or on the surface, communicating directly with the brook itself. No doubt, all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such a channel. In this case a basin is formed in his land, which belongs to him, and the water from the heavens lodges there. There is here no watercourse at all. If this water exceeds a certain depth it escapes at the lowest point, and squanders itself (so to speak), over the adjoining surface. The owner of the soil has clearly a right to drain this shallow pond, and to get rid of the inconvenience at his own pleasure. We have no doubt, therefore, that, as to this source of feeding the Longwood Brook, the plaintiff has no title."

In other words, this again is a case for the law of land, and not of waters; and this so-called pond of six acres, which the author would have us compare to any great pond in Massachusetts, fed by perennial springs, which forms an integral and important part of some great waterway with its vast power, turns out to be but an intermittent surface-sheet which, really a swamp, has no outlet in any defined channel, but is a nuisance and a fit subject for drainage.

(5.) Chasemore *v.* Richards, 7 H. L. C. 349, is a case of underground percolations diverted by the digging of a well.

(6.) Rawstron *v.* Taylor, 11 Exch. 369, is a case of surface-water; and, as is stated by Platt, B., in the latter case, "the defendant had a right to drain his land, and the plaintiff could not insist upon the defendant maintaining his fields as a mere water-table."

(7.) The Massachusetts cases on great ponds have already

been stated and commented on in the article on the "Watuppa Pond Cases." None of them afford countenance to the "perceptible current" theory, nor anywhere suggest the distinction taken by the writer. All of them are founded on the Colony Ordinance, and all those cited by the author raise issues affecting only the rights of littoral proprietors on the ponds themselves. Any expressions found in such cases must therefore be construed with reference to the points involved. In Fay *v.* Salem Aqueduct Co., 111 Mass. 27, so much relied upon, we find no mention of the fact whether or not Spring Pond had a perceptible current; but if anything can be found in the case inconsistent with the position that it was a watercourse, then it follows that it is immaterial, so far as concerns riparian owners on the outlet stream, whether a pond is a watercourse or not; for in cases arising under water-supply acts precisely similar in terms to the one in that case, which granted compensation for injury to "property," riparian owners on the outlet stream have been given the remedy there denied Mr. Fay for his alleged injury as a littoral proprietor on the pond. See Bailey *v.* Woburn, 126 Mass. 416; Watuppa Reservoir Co. *v.* Fall River, 134 Mass. 267; Cowdrey *v.* Woburn, 136 Mass. 409; Brickett *v.* Haverhill Aqueduct Co., 142 Mass. 394. The majority of the court in the Watuppa Pond cases apparently reconcile their decision with these cases on the theory that the riparian owner on the outlet stream has a property right in the flow of the water from great ponds, but that it is a right of property subject to be defeated by the paramount right of the Commonwealth; but the Law Reviewer's new proposition in the law of waters denies any property right at all to the riparian owner, and hence necessarily denies the authority of these decisions.[1]

[1] This theory, while affording a basis of a reconciliation between the earlier cases and the recent Watuppa Pond decision, will, if adopted, render the former inconsistent with Cole *v.* Eastham, 133 Mass. 65, 70, an authority much relied upon in the article on "Great Ponds," though beside the main line of argument. In that case the statute had authorized the town of Eastham to make the improvements necessary for the preservation and taking of alewives in a great pond and the streams connected therewith, enacted that the town should pay "all damages that shall be sustained in any way by any person in their property in carrying into effect this act," and further provided that the fishery so created should be the property of the town. The petitioners owned the land on both sides of a stream, which was not navigable, connecting with the pond; the land was taken by the town, and the petitioners claimed that they should recover damages also for the loss of the exclusive right of fishery. The court held that the right of the riparian owner to a fishery

These are all the cases relied upon to sustain the novel doctrine laid down in the article on "Great Ponds." Not one of them supports it; only one of them mentions "perceptible current," and that one for a purpose entirely different from that for which it was cited by the author.

We shall now examine the cases which in our opinion affirm the right of riparian owners on outlet streams to compensation for water diverted from lakes or ponds, which were either lightly brushed away or entirely overlooked in the article on "Great Ponds."

(1.) Smith *v.* Rochester, 92 N. Y. 463.

The action was by owners and lessees of mills upon Honeoye Creek to restrain the defendant from diverting the waters of Hemlock Lake from said creek. Hemlock Lake is a body of water about

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had in this Commonwealth, at all times, been subject to the paramount right of the public, and that when the statute provided compensation for the taking of "property" it must be considered that the property for which the petitioners "are to receive compensation is private property strictly, and not such as is held by them subject to the exercise of a public right." If the right to the fish, subject to defeasance, was not "property" within the meaning of the act in Cole *v.* Eastham, why should the right to the water have been "property" in Bailey *v.* Woburn, unless it be because that right is not subject to defeasance?

In other words, while the paramount right of the public to the fishing, even in streams not navigable, has always been recognized in this Commonwealth, the alleged paramount right of the public to an interest in the water-power of the State had never been recognized, until the Watuppa cases, 147 Mass. p. 548. In the former respect the common law had been "modified by successive legislative acts from the earliest settlement of the country, passed under the two governments of the Plymouth and Massachusetts Bay Colonies, as well as under the Province and our present form of government," and that because "there was much jealousy on the subject of exclusive individual privileges in fisheries" in early times. See Devens, J., 133 Mass. p. 67. In the latter respect, not a single act, until that of 1886, called in question in the Watuppa cases, had ever been directed against the private ownership of water-power; while, on the other hand, the mill acts had strained the constitutional power of the State to the utmost in support of the fullest enjoyment thereof.

The above distinction is quite in accord with the spirit of the Colony Ordinance of 1641–47, which was simply a democratic protest against the forestry and game laws of the mother country, but in other particulars did not provide or contemplate a change in the common-law rules of property.

It may be that legislation enacted before our Constitution, even though originally an encroachment on private property, if long acquiesced in, because in accord with the spirit of our institutions, should now be upheld by the court as a rule of property *ut finis sit litium;* but it is quite another thing to extend by forced interpretation an ancient ordinance to a new application subversive of a well established and long undisputed rule of property, in order by indirection to avoid the plain prohibition of our present constitution, which forbids the taking of private property for public use without compensation to the owner.

seven miles long and half a mile wide. The outlet of the lake unites with that of Canadice Lake, a stream of nearly the same size. After flowing about five miles, the waters of the two lakes unite with Honeoye Creek, the outlet of Honeoye Lake, and these united waters flow into the Genesee River, about sixteen miles above the city of Rochester. The plaintiffs owned mills upon the Honeoye Creek, below its junction with the waters of Hemlock Lake, and operated by the waters of the creek. A board of water commissioners, acting in behalf of the city of Rochester, conducted the waters of Hemlock Lake through a conduit to the city of Rochester, for the use of its inhabitants. The waters of Hemlock Lake were a part of the navigable waters of the State. Held, that the State could not divert, nor could it authorize the diversion of the waters of this lake, to the detriment of the plaintiffs, without making compensation therefor. The question made was on the right of the State under its authority as sovereign — the *jus publicum* — to divert the waters of navigable streams.

This case, the LAW REVIEW writer says, "does not say a lake is a watercouse. There was no finding whether there was a current or not,"— strong evidence, surely, that that issue was immaterial, for the case was apparently most carefully argued and considered.

He adds that it "was exactly the case of 134 Mass. 267," where the court held that the act provided for such damage. But he omits to state that the New York court rested its decision on constitutional grounds and not upon the wording of the act.[1]

(2.) Gardiner *v.* Newburgh, 2 Johns. Ch. 162. An injunction was granted against the diversion of a spring on the land of one of

[1] The opinion in this case is very much in point on the rights of the State in great ponds. Much confusion has arisen, says the court, from a failure to distinguish between the two kinds of ownership which can be predicated of the State; the first, the proprietary interest,—*jus privatum*,—which is subject, like an individual's right of property, to the maxim, *Sic utere tuo ut alienum non lædas;* the second, its sovereign rights,—*jus publicum*,—which it holds in trust for its citizens. Considered with reference to rights in water, "the controversies which have arisen over the nominal ownership of the soil under such waters have been magnified beyond the real interests involved. . . . Neither subject nor sovereign can have any greater than a usufructuary right therein." *Aqua currit et debet currere.* By virtue of a proprietary right as riparian owner "the rights of the State have entitled her to the same uses and subject her to the same liabilities as other owners of property." By virtue of her sovereign rights, the State may control navigable and public waters; but this is an easement for the public benefit, and is to be limited to the purposes for which it was created. Hence, "the diversion of these waters for the purposes of furnishing the inhabitants of a large city with that element for domestic uses, . . . is an object totally inconsistent with their use as a public highway or the common right of all

the defendants, which watered the farm of the plaintiff and supplied his brick-yard by means of a natural stream of water flowing therefrom. No provision was made for compensation to the plaintiff, through whose land the water issuing from the spring had been accustomed to flow. "To divert or obstruct a watercourse," says Chancellor Kent, "is a private nuisance; and the books are full of cases and decisions asserting the right and affording the remedy."

(3.) Howe *v.* Norman, 13 R. I. 488, was a bill in equity for an injunction. The principal respondent admitted that there was a stream of water "which has its rise in certain springs arising on neighboring lands of this respondent, and forming thereon a large pond, which stream of water flows through the lands of the complainant." He alleged that he owned the water arising from such springs on his own land, and had a right to cut off any stream which ran from his land, "by erecting a dam across the place where the water takes the form of a stream upon his said lands." A decree was entered perpetually enjoining the defendants from preventing

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the people to their benefits." "We deny that" such use, although a public one, "is consistent with the purpose upon which the sovereign right is based."

So of great ponds, the right of the State as proprietor of their beds (if it exists) is no greater than that of the private owner of a small pond; and the sovereign right to control its uses as a pond for the benefit of the public at large is inconsistent with a right to diminish or destroy it for the benefit of a particular body of its citizens, for a town or a city.

Smith *v.* Rochester should also be read in connection with People *v* Appraisers, 33 N. Y. 461, which the Law Reviewer cites, although it has no bearing on the law of lakes or of still waters. In the latter case it is said of the former, "It will be observed that the case relates to the Mohawk river and an appropriation of its waters for the purpose of navigation alone—that being one of the uses which universally pertain to the rights of the sovereign in all navigable streams. . . . We think the authority of these cases should be confined to the waters of the Hudson and the Mohawk rivers."

It is to be observed further that the Mohawk river case affords no parallel to the Watuppa Pond cases in Massachusetts. The New York courts decided it upon the ground that the complainants had no proprietary rights in the Mohawk whatsoever; the State owned it, not only at the point where the diversion took place, but at the point where the complainants were established. Assuming this to be true, the result that the complainants had no claim for damages was inevitable; but obviously this is entirely irrelevant to the Massachusetts case, in which the State undertakes to divert the waters in its pond to the injury of the riparian proprietors' rights in their river. *Non constat* that under the New York decision a riparian owner on the Hudson, if the State were not deemed the owner of the latter also, could not have claimed damages if injured by the diversion from the Mohawk. This plain distinction appears to have been overlooked by the author.

or in any way materially diminishing the customary flow of the stream; and in delivering the opinion, the court said: —

"The first defence is that the defendant Norman has a right to intercept and appropriate the water because it comes to the surface on his own land, rising there in springs, and forming a pond. It is admitted, however, or at any rate it has been made to appear to the court, that the water, though rising on Norman's land, flows away from it over the land of the complainant, into her door-yard, in a natural and definite course or channel. To allow Norman, therefore, to intercept and appropriate it would be to allow him to deprive the complainant of a natural and immemorial privilege or easement appurtenant to her estate, and which is as much a part of her estate as the ground to which it appertains. At common law, of course, he has no right to do this."

The Law Reviewer apparently admits the authority of this and of the preceding case, but says that the springs formed a portion of definite subterranean watercourses, and that the cases "tell us nothing about the law of lakes." There is no finding in either of the cases as to a "definite subterranean watercourse," and we suppose a spring may or may not be a portion of such a watercourse. It would be interesting, however, to have the distinction stated, if any there be, between the large pond formed by springs in the Rhode Island case, and the great pond formed by springs in the case of the North Watuppa Pond, or between the legal positions of the complainants in the two cases.

(4.) In Clinton *v.* Myers, 46 N. Y. 511, the plaintiff owned the land forming the boundaries, and at the outlet of "a natural pond of about forty acres." This pond was formed by springs and surface-water during the rainy season, and by melting snows. This pond he utilized as a storage reservoir by means of a dam across and at its outlet for the benefit of his cotton-mill, three miles below, upon the outlet stream. The defendant, who owned a water-privilege and saw-mill on said stream, below the pond and above the cotton-mill, raised the gate in plaintiff's said dam, and let off large quantities of water. The court stated that "This right, claimed by the plaintiff, to detain such surplus water of the stream as he may not require for present use until wanted in a dry season, has no foundation in the law, and is in direct conflict with the maxim, *Aqua currit et debet currere ut currere solebat.*" The writer complains again that nobody raised his point. That is true. Further he says, "The court only decided questions as to

unreasonable use of the dam." It was found that the use was most reasonable, and to the benefit of the defendant as well as of the plaintiff. But why decide such questions, when it would appear that the plaintiff owned the pond in the same sense that the State owned the North Watuppa, or in a larger sense?

(5.) Schaefer *v.* Marthaler, 34 Minn. 487, was an appeal from a judgment perpetually enjoining defendant from interfering with or diverting the course and flow of a lake or pond covering four and one-fourth acres in extent, situated partly on the plaintiff's land and partly on the defendant's land, "in a natural depression forming a basin, fed solely by surface-waters produced by rains and melting snows falling upon higher adjacent lands, and running naturally into such basin. . . . The character of the soil under the basin is such that it retains the water, so that the only waste is from evaporation, except during high water, for six or eight weeks in the year, when it overflows through a natural channel situate on defendant's land." The defendant claimed the right to drain the lake or pond "on the proposition that it is surface water." Held, that, under the common law, there is a marked difference in the rules governing in cases of surface-waters and those applicable to watercourses; that in this case the law of watercourses was to be applied and the injunction to be sustained. The court says:—

"And such waters, when they have ceased to spread and diffuse over the surface or percolate through the soil, when they have lost their casual and vagrant character, and have reached and come to rest in a permanent mass or body in a natural receptacle or reservoir, not spreading over or soaking into the soil, forming a mere bog or marsh,—cannot be regarded as surface-waters any more than they can be after they have entered into a stream. The mass or body of water constituting a lake or pond is an advantage or element of value to the lands upon which nature has placed it, of the same kind as is the watercourse to the lands through which nature has caused it to flow. There is no reason which can be suggested why the stream should be the property of each on his own land, of all the lands through which it flows, and why one owner should not prevent its flow as nature caused it to flow upon the land of another, that is not equally applicable to a body of water like this; and none can be suggested why the rights of the owners of the lands upon which nature has placed it should not be equal to the rights in respect to a stream. Applying the same rules that apply in respect to a watercourse, it would follow that no one is bound to keep his land as a water-shed to feed such a body of water, nor as a receptacle to retain the overflow from it; but that, in the reasonable and ordinary use or improvement of his land, he may interfere with or arrest the surface-waters before they reach such

body, or may drain off any bog or marsh on his land formed by the overflow, although the doing of either may incidentally affect the amount of water in the lake or pond. We therefore hold that defendant had not the right to drain off the lake."

Of this case the writer says, "They do not decide it to be a watercourse." But they do apply the law of watercourses thereto; and it should be noted that this is the only case thus far cited of a still pond. Except for the six or eight weeks of the year, when the overflow found a natural channel, its only loss was by evaporation. Had it been a pond like the North Watuppa, constantly fed by springs, and constantly overflowing through its outlet, there can be no doubt the court would have held it a watercourse in fact as well as in legal similitude. This distinction is well illustrated by the case next to be referred to. The writer says, "The point adjudicated was decided differently in a Massachusetts great pond case" (Fay *v.* Salem Aqueduct Co., 111 Mass. 27). If so, that case was expressly put upon the Ordinance of 1647, which the court held changed the common law, and is therefore not in point for the writer.

(6.) In Hebron Gravel Road Co. *v.* Harvey, 90 Ind. 192, it was held that a lake fed by springs, the water of which in times of flood finds exit by rapid percolations through a bed of gravel, so that there is a sensible current towards the gravel bed, is a running stream, and not merely surface water; and one who obstructs the flow to such place of discharge and thereby causes the water to overflow the lands of another is liable for the consequent damages. It was expressly held that a movement of the waters, though imperceptible to ordinary observation, would make a watercourse. The movement of the waters of the Watuppa ponds, though imperceptible in the body of the North Watuppa, was constant, and in natural open channels. *A fortiori* were they a watercourse.

(7.) In Reid *v.* Gifford, Hopkins Ch. 416, an injunction was granted to restrain the defendant, who had cut a subterranean passage upon his own land, which bordered upon Leigh's lake, by which he drew off a part of the water, sufficient to turn a saw-mill. The complainants were seised of certain lands, through which the outlet of Leigh's lake had flowed from time immemorial. The Chancellor said:—

"The new outlet was made by the defendant, Eli Gifford, through his own land; but he had no right to use his land in such manner as to deprive others of the enjoyment of their rights. He had no right to divert this water from its natural channel; that channel and the water flowing through it being the private property of the complainants."

The injunction was subsequently dissolved, upon the facts turning out otherwise than as alleged. If this lake was not a watercourse, then the diversion of a lake not a watercourse is actionable, if thereby the water flowing in the outlet stream is diminished to the detriment of riparian owners.

(8.) In Bennett *v.* Murtaugh, 20 Minn. 151, the plaintiffs operating mills upon the Le Sueur river, which was largely supplied with water from Lake Madison, obtained an injunction against the extension by the defendants of a ditch through a marsh towards the lake, about a mile distant from its outlet, the effect of which would be, at periods of high water when the lake overflowed the marsh, to divert water from the lake to the injury of the water-power of the plaintiffs. The court said: —

"As there is no question made as to the right of plaintiffs to the water-power used by them, and as it is found that a considerable part of such water-power is supplied from Lake Madison, the waters of which naturally flow into the Le Sueur river, . . . defendants cannot as against plaintiffs rightfully draw off or divert the waters of said lake."

It is true that the court did not say in terms that Lake Madison was a watercourse, nor determine anything about its current; but why should it?

(9.) Unfortunately in Massachusetts the question of the rights of riparian owners on an outlet stream arising from a diversion of the pond seems never to have arisen in the case of a pond not affected by the Colonial Ordinance. The great pond cases, however, are direct authority for such owners, because: —

First. It is the basic assumption in them all that the law, even as to littoral owners, would be different in case of ponds not affected by the ordinance.

Second. In the two cases where such rights were discussed independently of a water-supply act, able judges, delivering the opinions of the whole court, affirmed their rights.

Third. The decision in Bailey *v.* Woburn, and Watuppa Reservoir Co. *v.* Fall River (*supra*), where the question arose under a water-supply act, necessarily affirmed their rights.

The analogy which Chief Justice Shaw[1] thought to be a strong one, of "the owners of a mill with the privilege of a mill stream, and the riparian owner of land on a large pond supplying such mill stream" . . . "to that of riparian proprietors on a running stream," has never been doubted or denied, but has been affirmed in Paine *v.* Woods, 108 Mass. 160, which was a complaint under the mill acts for flowage damages by the littoral proprietor on a great pond. No question was made as to the liability of the miller on the outlet stream for such damages, and on the question of offsetting benefit to the littoral complainant, it was laid down that "the owner of the land thereby flowed . . . may use it [the water] for watering his cattle or irrigating his crops and gardens, or any other reasonable purpose which does not practically and in a perceptible and substantial degree impair the right to run the mill; and so he may take and carry away the water when formed into ice, for use or sale, provided he does not thereby appreciably diminish the head of water at the dam of the mill owner." In this case, the right of the miller to an undiminished flow from a great pond is clearly affirmed, though, for all that appears, there was no perceptible current therein. The towns took *per formam doni* in Bailey *v.* Woburn, and Watuppa Reservoir Company *v.* Fall River, says the LAW REVIEW writer. The form of the grant in the latter case was this: "The city of Fall River shall be liable to pay all damages that shall be sustained by any person or persons in their property" by the taking of water from the pond. The form of the gift required payment for "property" taken and for nothing else. Unless, therefore, the mill-owners on Fall River had, in the opinion of the court, at that time a right of property in the flow of the stream undiminished by diversion from the Watuppa Ponds, the form of the gift to the city gave them no remedy. If, however, their "property" was taken, they had a remedy independently of the act.

We submit, therefore, that it has been settled by abundant authority that the riparian owner on the outlet stream of a pond not affected by some special ordinance, like the Ancient Charter of 1641–47, has a right of action for diversion of water from the

[1] Barrett *v.* Cummings, 10 Cush. 186.

pond, whether we consider a pond a watercourse or not; but in point of fact, the case of a pond like the North Watuppa meets all the requirements of a watercourse. It has defined banks and bed and a constant source of supply, and it *flows*, as all lakes of importance to water-power do flow, although not everywhere with perceptible current. "Flow," not "perceptible current," is the language of the cases on watercourses. If the water does not flow, it is unimportant for the purposes of this discussion, since it cannot provide water-power. In those lakes which are a part, either initial or incidental, of a natural waterway, the drop of water which reaches the defined boundaries of a pond "has reached the natural guide which is to compel it to the plaintiff's wheel," as much as if it had entered the river itself or a connecting stream. Unless lost by diversion or evaporation, it must get into the outlet stream sooner or later. The rate of flow in ponds, as well as in streams, can be scientifically determined by hydraulic engineers, and depends upon the size and form of the pond, and the relations they bear to inlet and outlet. For example: A small pond, situated between and connected with, two larger ones, will have a much more rapid flow than either of the larger ones. From the point of view of the miller or the engineer, it makes no difference whether the current is fast or slow, or even imperceptible; whether fast moving or slow moving, it will eventually be used as power, unless evaporated. The test of perceptible current is not a legal test; it is both unpractical and unscientific. Perceptible in what degree? it may be asked. To the eye; and to what eye? To one of powerful or of weak refraction? Again, must the water be perceived itself to move, or a chip upon its surface? and within what limit of time must the movement be determined, — instantaneously, or at an interval, as in the case of the hour-hand of the clock? In fine, what difference does it make whether we see it move or not, provided it does move, and consequently affords power below?

Let the reader cast his eye over a topographical survey of Massachusetts, and observe the network of ponds and lakes and rivers which form its waterways, each drainage basin having its own peculiar characteristics, according to the physical geography of its location. In some the water first collects in a pond or ponds, and then, by means of a river, runs directly to the sea; others have their sources in several ponds connected by streams,

while others again, first rising in springs or rivulets, form a river, which afterwards, in mid-course, opens into ponds or lakes; while the more important rivers are fed along their course at intervals by rivers either having their rise in ponds or flowing through them in some part of their course.[1] What is the "practical sense" of the matter? Are these component parts of defined water-channels, through which the drop, falling on the highest plane of the drainage basin, finds its way to the sea, to be divided according as the course of the stream is broad and slow moving, or narrow and swift, the water at one point being divertible, and at the next protected by the law? What practical sense can the miller see in the distinction without a difference between the damage done him by a diversion of the down-coming supply at a point above him on a pond, or at a point on the river above or below the pond? Wherever diverted, the effect on him is the same. On the other hand, he can well comprehend that his right to the flow of his stream past him is limited, and must be limited, like all other rights, by the rights of others, and consequently cannot extend to depriving his neighbors of such common and reasonable uses of their land as the felling of trees, the digging of wells, and the draining and improving thereof, although such uses may affect injuriously the flow of water which would otherwise exist.

Riparian owners on lakes or ponds do not interdepend as to their rights, says the author, "certainly not as riparians upon running water do. Therefore no similar body of law has come into existence to regulate lakes." And he adds: "It cannot be right to force the lake partners into the partnership of stream partners." It should be borne in mind always that the question

[1] For instance, taking 100 of the great ponds which contribute to the waters of the Nashua river:

18	have	no	considerable	stream	entering.
20	have	1	or more considerable	streams	entering.
20	receive	water	from	1	pond.
12	"	"	"	2	ponds.
10	"	"	"	3	"
6	"	"	"	4	"
4	"	"	"	5	"
3	"	"	"	6	"
2	"	"	"	7	"
2	"	"	"	8	"
3	"	"	"	9	"

[H. F. Mills.]

at issue has no relation to the interdependent rights, if any, of "lake partners." Whether or not they have the same right to insist upon the flow of the water past them that the owners on the stream have, it is of vastly less consequence to them, because, having no fall to utilize, they have no water-power. The correlated rights, if any, of lake proprietors in the reservoir of the lake cannot affect, and have no bearing upon, the rights of those interested in the water-power which falls from the lake. The assumption, however, is unfounded that they have no rights in common in the waters of the lake. In small ponds, less than ten acres in extent, they have always been understood to have an interest in common in the water and in the land thereunder. As to the waters above which flow into their lake, they have probably the legal right to insist that they shall flow undiverted to them, although they cannot make use of them for power, and hence the right is ordinarily of little moment. The discussion, however, is entirely irrelevant on a question arising between the riparian owners on the stream below and on the pond above.

Much of the argument with which the author seeks to support his thesis is in the form of rhetorical questions, founded on misconceptions of the actual nature of a pond, and based upon hypothetical conditions, often, we are compelled to think, geologically and hydraulically impossible.

In no lake which "has an outlet over which its surplus waters flow, when there are any, into a watercourse," can there exist a "changeless" body of water, though the lake itself lies "below the bed-rock of the outlet," perhaps a hundred feet deep. Every particle of water delivered at the inlet or supplied by springs beneath the surface must finally reach the outlet. There is a ceaseless interchange of particles throughout the length and breadth and height and depth of the pond; and if a condition so abnormal were physically possible, if the flow of the lake went on over such a layer of quiescent water, the case could present no difficulties. Every drop subtracted from beneath must be replaced by a drop from above, and the subtraction would operate as a direct diversion from the moving mass. As well allow the river bank to be cut through, or the bed to be excavated, as to allow a permanent bank or bed of water to be withdrawn. As well question the effect of diverting the water of a river by drawing from the bottom of the deep pools so frequently found in

streams, since these would have an equally "changeless bottom." It is not by raising difficulties of this character that a legal distinction of ponds from rivers can be proved. Once let it be conceded that a lake may, in law as in nature, be part of a watercourse, and no inconvenience will result, though it have as many outlets as the Mississippi. Once concede that the same rules as to diversion govern the stream and its source, and we need apprehend no trouble in disposing of questions of intermittent or inconstant flow, or of temporary drying up of the outlet stream.

It would hardly be profitable to follow our author throughout all his excursions into the realms of the supposititious. Brooks may, perhaps, in the future originate from ponds, though surely not in the manner described in the article; but the question of what rights will exist in respect to the new stream can have no bearing on the present discussion, and its decision would depend upon the same principles that would govern in case of any other watercourse newly developed as a result of physical changes taking place upon or below the surface of the earth, and would involve no greater difficulties. But let us consider a more probable case, in which a pond by the constant corrosive action of the water at its outlet, eating down the land to the bottom level, narrows into a river channel; can it for a moment be conceived that the change would impose any additional liability to pay for water withdrawn from the now river, indistinguishable as it is from the rest of the watercourse? And is it not obvious that no reason exists for the liability as to future diversions that did not exist equally before the work of nature had changed the superficial characteristics of the former lake? Or again, can it be supposed that if a river, as the result of a land-slide or other physical cataclysm, loses in the velocity of its current and expands into a sheet of placid and seemingly motionless water, of perhaps many acres, that the riparian owners below the point thus affected thereby lose their rights to the continued flow, and that by drawing from this newly created lake, the entire waters of the river may be taken without compensation? These questions are not founded upon purely imaginary states of facts. Such changes are, if infrequent, within the limits of experience, and they show the irrational nature of a rule which, if carried out, must in the one case add to a watercourse a section previously unrecognized as such, and in the other segregate a still continuous waterway into parts joined by an anomalous fragment, subject, we are told, to totally diverse rules of law.

The radical difficulty with the article arises from the assumption pervading it that if lakes and ponds cannot for all purposes be brought within the limits of the law relating to streams and rivers, questions concerning them must be remitted for decision to the principles applicable to land. Limiting the application of the law of watercourses by a definition based on an arbitrary distinction not referred to in the books, founded on no scientific fact and on no legal principle,—adopting as an immutable rule the fleeting and delusive test of perceptible motion, in disregard of physical conditions and logical requirements, it seeks by thus excluding lakes and ponds to show that they are not subject to the rules of law naturally governing them. But the limitation would be inadmissible even as matter of nomenclature. Ponds cannot be relegated to the domain of mere surface-water, nor can the flow from them be likened to the "passage of rains and melting snows" over the land. The great pond supplying a mill stream must be deemed in name, as in reality, the first segment of a "watercourse." The river at some point in its course, flowing through a lake in which, from its size, the current is imperceptible, does not in law or in nature cease its existence as a "watercourse" at the one end and resume it at the other. The question is one of facts; and in either case, the pond, whether as the source, or as the connecting link, is a physical fact, necessary to and structurally a part of the stream. It is no longer the vagrant thing that Blackstone thinks "like a bird, to be of a wild, untamable nature;" the requisite possession of the water has been taken; it is confined by definite boundaries, and dedicated by the circumstances of its environment to the flow of the stream, as effectually as if running with the rapidity of the mountain cataract. Separated from the stream itself only by the thin and artificial distinction of the degree of motion, it bears no analogy to the "watery swamp;" and in every respect, save that of swiftness, has the characteristics of the "running river." The swamp is, after all, but "watery" land, in which the owner may have the usual rights of digging and draining, while the pond is primarily a fixed body of water, such as the common law has never yet allowed the private owner to divert or drain to the damage of the owners of water-power below.

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